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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1262

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

COUNTY OF FRESNO

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

COUNTY OF TUOLUMNE

On Appeals from the California Court of Appeal,
Fifth Appellate District

Brief for the Appellees, County of Tuolumne

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I. STATEMENT OF THE CASE

A. The Proceedings Below

For the 1967-68 fiscal year Appellee's Assessor determined that the individual Plaintiffs herein had taxable

possessory interests in the dwellings they occupied on the lien date in 1967 and entered assessments against the individual Plaintiffs accordingly. The dwellings occupied by the individual Plaintiffs were owned by and were located on real property owned in fee by the United States of America and were assigned to the individual Plaintiffs by the Forest Service of the United States Department of Agriculture as an incidence of their employment by said Forest Service. Those dwellings are located in the Stanislaus National Forest within the County of Tuolumne.

Each individual Plaintiff paid his respective property tax based on said possessory interest under protest and then applied to Appellee's Board of Supervisors sitting as a local Board of Equalization for cancellation of the assessment and for a refund of the taxes paid. The Plaintiffs' application was heard by the local Board of Equalization on November 14, 1967, and denied. The individual Plaintiffs then brought suit by and through Appellant United States of America to recover the taxes paid claiming that (1) no such possessory interest existed under California law, (2) if such a possessory interest existed under California law, assessment thereof was violative of the United States Constitution, and (3) if valid possessory interests existed, Appellee's Assessor's valuation thereof was excessive arbitrary and capricious.

The cause was tried by the Superior Court for the County of Tuolumne sitting without a jury on November 27 and 28, 1972. The trial court gave judgment for the Plaintiffs but reached only the first issue raised by Plaintiffs, concluding that the individual Plaintiffs did not have possessory interests under California law in those dwellings and, therefore, assessment and taxes based thereon were illegal and void. The trial court did not reach the other two issues raised by Plaintiffs.

The judgment of the Superior Court was appealed to the Court of Appeal of the State of California, Fifth Appellate District, which reversed the Superior Court for the reasons set forth in *United States of America, et al., v. County of Fresno* reported at 50 Cal. App. 3d 633. The Court of Appeal found that, as a matter of California law, possessory interests did in fact exist and that the United States Constitutional issue was unfounded. The United States then petitioned the California Supreme Court for a hearing, which was denied. The United States then appealed to this Court.

B. The Individual Plaintiff's Possessory Interests

On the lien date in 1967 the individual Plaintiffs herein were physically occupying the dwellings for which the possessory interests assessments were made (A. 282) and were using those dwellings as residences for themselves and their families (A. 260, 272, 275-6). The dwellings involved herein were single family residences and *not* mobilehomes, trailers or fire lookouts (A. 285-6) and were *not* located in isolated areas (A. 285-6). Those dwellings were thought to be adequate as homes for their families by the individual Plaintiffs (A. 272, A. 276). Those dwellings were occupied by the individual Plaintiffs pursuant to certain written regulations known as Budget Circular A-45 (Plts. Ex. 1, A. 123-139), the Forest Service Manual (Pltf. Ex. 2, A. 140-166) and the R-5 Western Regional Supplement (Pltf. Ex. 3, A. 167-189.) These regulations recognize generally accepted landlord-tenant relationships as applicable to the dwellings (Pltf. Ex. 2, A. 146).

With a few exceptions the individual Plaintiffs herein were not required to live in the dwellings and could freely select another residence not owned by the United States (Pltf. Ex. 2, A. 141). Thus, in most cases the individual

Plaintiffs freely chose government dwellings in which to reside. An individual may even appeal a superior's decision about the assignment of a government dwelling (A. 280) and may participate in selecting a particular dwelling (A. 272).

Rental rates for the dwellings are established under written regulations by sampling private rental rates for comparable housing in the area (Pltf. Ex. 1, A. 123-139; Pltf. Ex. 2, A. 147-165). The United States does not deduct the taxes paid for private housing to determine the rental of its quarters, thus turning a "profit" for the government. An individual occupying these dwellings may even appeal the rental rate established (Pltf. Ex. 2, A. 166), a right not enjoyed by most tenants in private housing. An adjustment in the rental rate is made for any space devoted to official use (Pltf. Ex. 2, A. 183). The United States recognizes that some infringement on the privacy of homelife exists by the nature of the employment, but does not adjust the rent accordingly (Pltf. Ex. 1, A. 161). Apparently the United States considers these dwellings comparable to private housing.

In their occupancy of the dwellings the individual Plaintiffs provide their own minor maintenance (Pltf. Ex. 2, A. 147; Pltf. Ex. 3, A. 169) just like most tenants in private housing. The individual Plaintiffs must pay for their own utilities (Pltf. Ex. 2, A. 164), again, just like most tenants in private housing. The dwellings occupied by the individual Plaintiffs are subject to inspections for official purposes (fire, safety) after advance notice (Pltf. Ex. 2, A. 147) which is in fact given (A. 264, A. 271, A. 276). Those inspections are primarily for protecting the dwelling, a normal concern of a landlord, and the occupant (A. 250-1). Nothing can be found in the regulations to allow a superior

to enter the dwellings for other than officially approved purposes. Although at least two of the dwellings involved herein had government radios in them which could be used by other than the occupant, use of those radios is limited to official business only (A. 245-247).

In sum, although there are some restrictions, the individual Plaintiffs were using these dwellings as homes for themselves and their families. It was this private beneficial use of the individual Plaintiffs that was the subject of the possessory interest tax imposed by Appellee; the tax was not against the United States or its property.

II. SUMMARY OF ARGUMENT

While *McCulloch v. Maryland,* 4 Wheat, 316, is still good law, it does not prohibit the possessory interest tax herein sought to be imposed on the individual Forest Service employees for their private beneficial use of the dwellings as homes for themselves and their families. The tax is not against the United States or its property but rather is against the private beneficial use made by such employees.

III. ARGUMENT

A. Introduction

McCulloch v. Maryland, 4 Wheat. 316, established the principle that the United States of America is itself immune from taxation by its constituent parts. Although decided in 1819 *McCulloch, supra,* is still the law of the land, as it were, as regards the immunity of the United States from taxation. However, *McCulloch, supra,* itself recognized that, although the United States is tax exempt, such exemption does not extend beyond the United States as an entity. Chief Justice Marshall speaking for the Court in *McCulloch, supra,* at page 436, said:

> "This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state."

We must, therefore, review the immunity doctrine as it has evolved and as it applies to the facts of the instant case.

B. The Immunity Doctrine

The immunity doctrine was originally applied very harshly (see, e.g., *Collector v. Day,* 11 Wall. 113; *Dobbins v. Erie County,* 16 Pet. 435). However, the Court has retreated from that earlier harsh view and now regularly sustains non-discriminatory taxes against federal employees (*Graves v. New York ex rel. O'Keefe,* 306 U.S. 466) and government contractors (*City of Detroit v. Murray Corp.,* 355 U.S. 489, *United States v. Township of Muskegon,* 355 U.S. 484, and *United States v. City of Detroit,* 355 U.S. 466). Appellee concedes that none of the above-cited cases is directly in point and that all can be distinguished on their facts; Appellee believes that no case can be found that is directly in point. However, the principles enunciated therein establish the immunity doctrine, which doctrine then can be applied to our particular facts.

The above cases show that this Court has consistently taken a practical approach in analyzing any claim to immunity.

Appellants are relying on the direct immunity of the United States rather than any doctrine of implied immunity.

C. Forest Service Employees Not Instrumentalities of the United States in Use of the Dwellings Upon Which the Tax Was Imposed

Appellants in their brief concede that the interests of the individual Forest Service employees that are the subject of the possessory interest tax can be conceptually distinguished from the ownership interest of the United States. It is this very interest that is the subject of the tax. The individual Forest Service employees are not chattels as Appellants seem to assert. They are citizens of the State of California, enjoying its protection.

In their use of these dwellings they are acting like most any other citizen of California who rents property. The United States appears to be renting the property to the individual Forest Service employees in its proprietary rather than its governmental capacity. Although renting such property surely benefits the mission of the Forest Service, it does not make the individual Forest Service employees mere chattels controlled by the United States 24 hours a day. They are enjoying a beneficial personal use of the property in that they are living in them as a home for themselves and their families and in that they do not have to seek other housing on the private market. They enjoy all of the other benefits of citizenship as their counterparts in private housing do. The individual employees should contribute their fair share to support that citizenship.

D. Taxation of the Armed Forces Is Not an Issue

At two points in their brief Appellants bring up personnel of the United States armed forces. Such discussion only clouds the issue before the Court. Taxation of such personnel is not before the Court and any resolution thereof should be left to a time when a concrete set of facts regarding their taxation is before the Court.

E. Conclusion

Since the possessory interest tax is against the private beneficial use of the individual Forest Service employees and not against the United States or its property, the judgment below should stand.

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